



THE VETERANS CONSORTIUM  
PRO BONO PROGRAM

# Thank You!



THE VETERANS CONSORTIUM  
**PRO BONO PROGRAM**

## **Camille Soleil, Executive Director**

Providing Pro Bono Representation before the  
US Court of Appeals for Veterans Claims

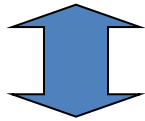
# Today We Will Discuss:

- Veterans Consortium Pro Bono Program
- U.S. Court of Appeals for Veterans Claims
- Appealing Beyond the Court
- Success Stories and Challenges

# **The Process for Veterans' Claims**

# THE PROCESS

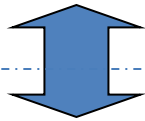
- **Veteran Files Claim at the VA Regional Office**



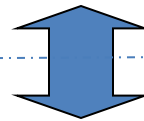
- **Appeals to Board of Veterans Appeals**

Within the VA  
System

\*POA\*



- **Appeals to U.S. Court of Appeals for Veterans Claims**



- **Appeals to U.S. Court of Appeals for the Federal Circuit**  
Last Appeal of Right

Outside  
the VA  
System

\* No POA\*

# **The Veterans Judicial Review Act of 1988 Created**

***US Court of Appeals for Veterans Claims***

**Adversarial**

**Located in DC**



# The Need for Representation

***1991***

**80% of Appellants were  
Self-Represented at filing of their case**



## Free Legal Services – National Program

- Created by a public law at the request of the Court in 1990
- Funded by Congress, through a Legal Services Corp Grant
- Founded by Four Service Organizations
  - **American Legion**
  - **Disabled American Veterans**
  - **National Veterans Legal Services Program**
  - **Paralyzed Veterans of America**







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## HOW WE HELP

# Pro Bono Program Mission Statement

All veterans or survivors who have taken an appeal to the U.S. Court of Appeals for Veterans Claims, **who has a legally credible claim**, and **who wishes to be represented** by counsel will have competent representation

*We accomplish this by:*

- Training volunteer attorneys
- Evaluating cases to identify issues that can be argued before the Court
- Matching appellants with volunteer attorneys
- Supporting volunteer attorneys during the representation before the Court

# Eligibility for a Free Attorney

- Final BVA Decision
- Wants to Appeal to the U.S. Court of Appeals for Veterans Claims
- Not otherwise represented
- Non-Frivolous Legal Argument:
  - Jurisdiction
    - Timely Filing
  - Procedural Issues
  - Substantive Issues



# Our Volunteers

- **Recruit from across the US**
- **All sizes of Law Firms and Solo Practitioners**
- **All areas of Practice**
- **2013: 200 Attorneys trained**



# Support for Volunteers

- Free full day training
  - Covers court practice and veterans benefits law

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- When matched with a veteran or family member we provide volunteer with:
  - Veterans Benefits Manual & Rules and Regulations
  - Sample pleadings and filings
  - Mentor to review and strategize

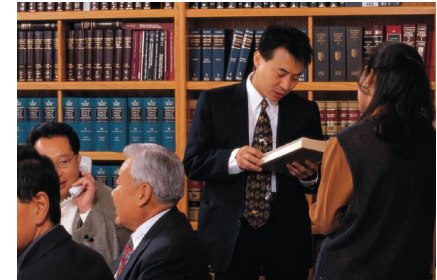
# Connecting With Pro Se Appellants

- ***Receive inquiries*** asking about the appeals process and our services
- ***Reach out*** to all unrepresented appellants who filed cases at the Court
- **Appellants return:**
  - Engagement agreements allowing us
    - access to their records
    - file stays on case if needed
  - Financial qualification questionnaires
    - Declaration of Hardship qualifies



# Program Evaluates the Case

- Case Management Attorney or Veterans Law Specialist
  - Review the BVA decision
  - Review the Record Before the Agency (RBA)
- Files a motion to stay to allow time for evaluation, if needed



# The Need for Representation

- **'04:           58% Pro Se at Filing**  
**22% Pro Se at Conclusion**
- **'09:           61% Pro Se at Filing**  
**28% Pro Se at Conclusion**
- **'11:           52% Pro Se at Filing**
- **'12:           42% Pro Se at Filing**
- **'13:           37% Pro Se at Filing**  
**21% Pro Se at Conclusion**



If the Appellants remain  
unrepresented...

# Free Limited Legal Assistance and Information *Helpline*

- Assistance with providing forms and completing relevant administrative paperwork
- Explanation of the Court's function, processes, and timelines
- Limited assistance with the informal brief and other pleadings
- Explanation of Court filings and decision memoranda

So Let's start near the end...

# FINAL BVA DECISION



# 2013 BVA STATS



**41,910 decisions**

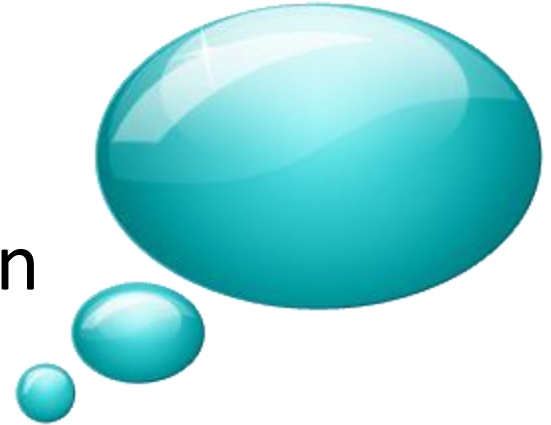
- Allowed Benefit (26.2% of Cases)
- Remanded (45.6% of Cases)
- Denied (24.2% of Cases) – Full denials only
- Other Disposition (4%)

# Options for a Board Denial

- Non-Adversarial (*remain at the VA*)
  - Filing Claim to Reopen at Regional Office
  - Filing Motion for Reconsideration with the Board
  - Filing Motion to Revise Previous Final RO/BVA Decision because of CUE
- Becomes Adversarial
  - Filing Notice of Appeal to the U.S. Court of Appeals for Veterans Claims



# Consider



- Motion for BVA Reconsideration
  - *Slows down the process*
  - *Less than 1 percent granted*
  - *Court does not have jurisdiction of an appeal if Reconsideration pending at the Board*
- **Appeal to the Court**
  - Notice of Appeal must be filed in within 120 days
    - Process for working with late filings (discussed later)



# Contents of Notice of Appeal

## Must include

- Must show intent to appeal and include date of Board decision being appealed
  - Use Court Form #1 **OR**
  - Use magic words “Appealing BVA Decision dated \_\_\_\_”
- Declaration of Financial Hardship (“would be a hardship for me”) – *OR* – *pay \$50 filing fee*
  - *Court Form #4*

# TIPS TO FILING THE NOA

- If form 1 not used, be sure to clearly state:  
“Appealing BVA decision dated \_\_\_\_\_”
- Use Registered Mail – Return Receipt Requested
  - Key: Ensure the Court’s Address is **CORRECT** (*suite 900*)
  - If fedex then date arrives, not sent
- ...or Fax: **Veteran’s Responsibility to confirm arrival**

## **VSO Check List:**

- ✓ 120 days from BVA decision
- ✓ Results of each issue/claim (Is appealing a good idea?)
- ✓ Form 1 – Appeal
- ✓ Form 4 – Declaration of Financial Hardship

## *You can file for them...*

- [ ] My Notice of Appearance is attached.

OR

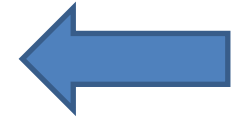
- [ ] My representation is limited to the filing of this Notice of Appeal, and I aver to the Court, in accordance with Rule 46(b)(2), that the appellant has been advised....

- *But Appellant must sign the Declaration of Hardship*





# Equitable Tolling

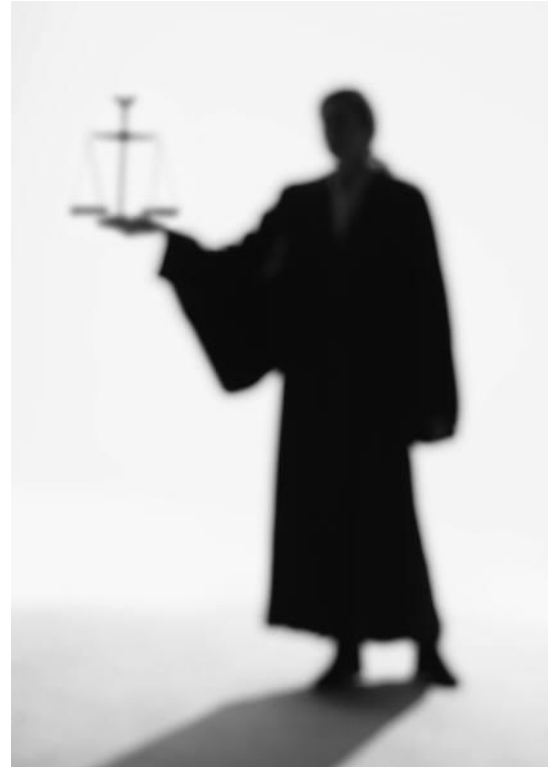


Exception to 120 Days Filing Deadline

- *Test is developing*
  - *Late due to extraordinary circumstances & beyond control*
  - *Exercised due diligence*
- *Examples:*
  - Mental Illness – incapable
  - Reliance on incorrect statement of VA official
  - Misfiling at RO or the Board
  - Failure to timely file due to extraordinary circumstances

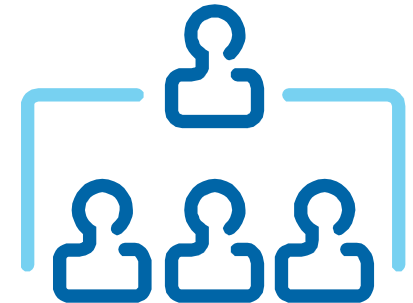


# THE COURT

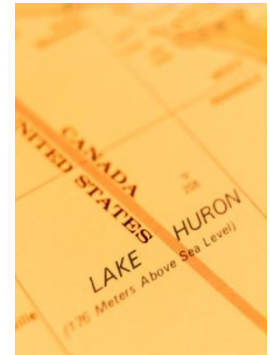


# Organization of the Court

- Three to seven judges including the Chief Judge
  - Currently has 9
  - Appointed by President for terms of 15 years.
- Clerk of the Court
  - Day to day functions
- Central Legal Staff (CLS)
  - Conducts telephonic conferences (*reps only*)
  - Initial evaluation of case and memorandum recommending disposition



# Court Jurisdiction



- Exclusive jurisdiction to review decisions of the Board of Veterans Appeals
  - Must be based on **final Board decision**
    - Cannot review a remand or a case currently being reconsidered at the Board level
- Veteran, widow, or dependent is *Appellant*; Secretary of the VA is the *Appellee*

# Standard of Review

- Reviews findings of fact on a clearly erroneous standard.
  - Definite and firm conviction that a mistake has been committed
  - Examples:
    - Disease incurred in service
    - Degree of impairment
    - Finding that a Veteran is employable
- Interprets Application of Laws and Regs

# Common Issues Before the CAVC

- Inadequate statement of reasons and bases

- Duty to Assist
  - Records
  - Examinations



- Inadequate medical exams and opinions

# Court Statistics

- Caseload
  - 98-04: averaged 2,318
  - 2007: 4,644
  - 2010: 4,153
  - 2013: 3,538
  - 2014: on track for 4,250





# **LIFE OF A CLAIM AT THE COURT**



# Court Flow Chart

- NOA – File within 120 days after Board decision
- RBA – 60 days after NOA
  - (record is fixed – no additions at Court level)
- RBA dispute – 14 days
- Conference (*reps only*) – After RBA and before Briefing
- Appellant's brief – 60 days after RBA dispute period



## *Flow Chart Continued...*

- Secretary's Brief – 60 days after Appellant's
- Reply Brief (optional) – 14 days after Secretary's brief
- Record of Proceedings – 14 days after reply briefing or briefing period ends
- Judge's Decision – indeterminate amount of time
- EAJA fees



# Disposition of Cases

- Single Judge
  - Almost all (80% or so)
- Panel of three Judges
  - Possibility of oral argument
    - *Less than 1 percent*
- *Full Court (En Banc) hearing is rare*



# Decisions

- If the case is **remanded**, the case will be sent back to the Board with instructions to take specific actions to remedy the error found in the Board decision.
- If the Board's decision is **reversed**, the case will be sent back to the Board with instructions to grant benefits. (Rare)
- If **vacated**, the case is sent back to the Board with specific instructions to cure the legal error.
- If the Board's decision is **affirmed**, the Appellant can appeal to the Federal Circuit.
- **Court or Voluntary Dismissal** – often when appellant is unrepresented.

# Joint Motion for Remand

Settlement agreement that usually ends with an agreement to vacate and remand the case back to the Board for correction of errors.

***Anytime during  
Court Process***



# EAJA Fees

- Attorneys are eligible for fees under ***Equal Access to Justice Act*** if case is remanded, reversed or vacated.
  - Only if the appellant prevails
  - Reviewed by the Court
  - Paid by government

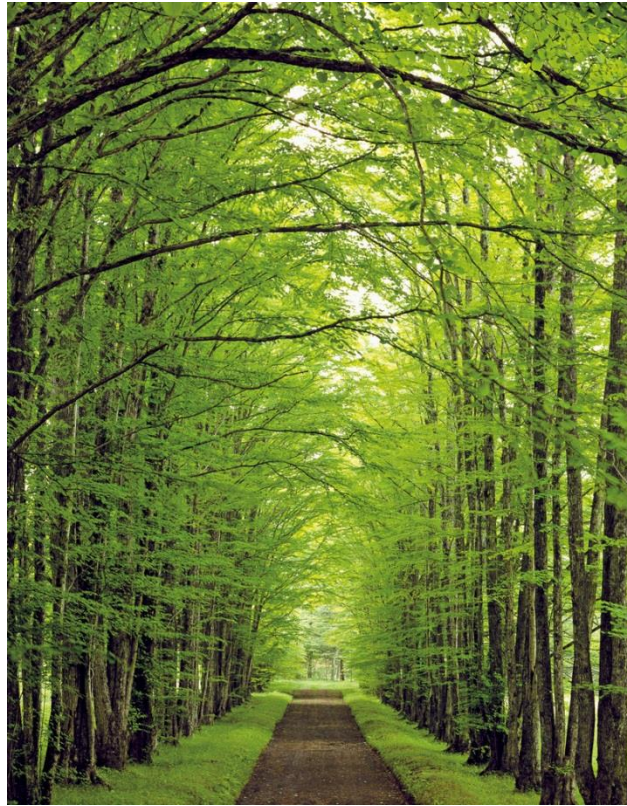
**Does not come out of the Veterans' benefits**

# The Court's Website

<http://www.uscourts.cavc.gov/>

- Forms for Appealing
- Docket Information
- Public documents filed and all decisions
- Rules of Practice and Procedure
  - E-filing (*reps only*)
    - Rules and access
- Information about attorneys and veterans law specialist practicing at the Court





# **BEYOND THE COURT OF APPEALS FOR VETERANS CLAIMS**



# U.S Court of Appeals for the Federal Circuit

- Exclusive jurisdiction to hear appeals from a CAVC decision
- **Last appeal of right** during the appeal process.
- Limited by statute. Federal Circuit is **not** permitted to review:
  - a) “a challenge to a factual determination,”
  - b) “or a challenge to a law or regulation as applied to the facts of a particular case.”
- Federal Circuit may only review actions to see if they are:
  - a) arbitrary or capricious
  - b) Unconstitutional
  - c) In excess of statutory jurisdiction
  - d) Potentially deficient.
- Federal Circuit may modify, reverse, or remand decisions by the CAVC, as appropriate.

# Supreme Court



If either party does not like the result of the Fed Circuit they can file a

“petition for writ of certiorari”

- Appeals must pass the test: not be moot at the time of the appeal
- The Supreme Court does not have to hear the case and may deny certiorari
- ***All decisions reached by the Court are final***



What our attorneys can do:

**SIGNIFICANT CONSORTIUM CASES**

# Khalil El-Amin 10-3031

U.S. Marine Corps  
1966 – 1969, service in  
Vietnam

- The VA examiner said that his PTSD **did not cause** his **alcoholism**, therefore did not contribute to the cirrhosis that caused his death.
- The Court found that the medical opinion was **inadequate because it did not** consider whether the PTSD **aggravated the alcoholism**.
- It is believed that this decision will make it *much easier for other veterans suffering from alcoholism and PTSD to connect the two conditions*.

# Michele Burden, et. al. 09-3233

Husband served 1948 –  
1968

- **Common law marriage** – Whether marital status is determined by state standards of evidence or federal standard to award DIC benefits.
- The BVA applied the Alabama standard of **“clear and convincing evidence”** and the appellant argued that the BVA should have used the federal **“benefit of the doubt rule”** reasoning that the burden of proof was procedural and not substantive.
- The appellant argued: “clear and convincing” standard had **no place in the pro-claimant system**. Court said **marriage is a specific exception** to “benefit of the doubt” rule under 103(c).
- The Court affirmed the BVA and the Federal Circuit affirmed the Court. The widow filed a writ of certiorari to the Supreme Court.

# David Henderson

05-0090



- Failed to file a NOA at the Court within the required 120 days.
- Court said it was a bar to filing an appeal, Fed Circuit agreed.
- Appealed to the Supreme Court which found that *in a veterans focused system there should be equitable tolling*.
- **Created Equitable Tolling: a major change benefiting veterans.**

# The Once and Future Claim

**RULE NO. ONE (1): Win it in the First.  
The Ninth is a long way away.**

**Your work with the Vets  
makes a tremendous  
difference!**



# Thank You



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